Supreme Court, U.S.
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No. 95-1642

In The

Supreme Court of the United States

October Term, 1995

FERNANDO GOMEZ, M.D.,

Petitioner,

v.

ALLEGHENY HEALTH SERVICES, INC., a/k/a ALLEGHENY HEALTH EDUCATION AND RESEARCH FOUNDATION; MEDICAL COLLEGE OF PENNSYLVANIA; DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER; BERNARD SIGEL, M.D.; HOWARD ZAREN, M.D.; PASCHAL M. SPAGNA, M.D.; STEVEN G. MEISTER, M.D.; GLEN WHITMAN, M.D.; LESLIE A. MILLER, ESQUIRE,

Respondents.

On Petition For Writ Of Certiorari To The Third Circuit Court Of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The petitioner is Fernando Gomez, M.D. The respondents are correctly listed in the caption, except that it is *The* Medical College of Pennsylvania. In addition, as noted in the Brief at 2 n. 1, all of the parties except The Medical College of Pennsylvania were dismissed prior to trial. Allegheny Health, Education and Research Foundation is the parent corporation of The Medical College of Pennsylvania.

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U.S. CONST. amend. V 1

RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Third Circuit. The Third Circuit's opinion is reported at 71 F.3d 1079. (For the convenience of the Court, all citations to the opinion will be to the opinion appended to the petition.)

COUNTER-STATEMENT OF JURISDICTION

Respondents agree that petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). Respondents disagree that this Court can properly exercise jurisdiction over those issues not presented to the court below. *See* discussion *supra* at 7 and 17.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Although petitioner accurately quotes the language of U.S. CONST. amend. V, respondents do not agree that it is relevant to this case.

In addition, 28 U.S.C. § 46, Assignment of judges; panels; hearings; quorum, is relevant to the review of the petition. Section 46 provides that:

* * *

> (b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court . . . .

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . .

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

COUNTER-STATEMENT OF THE CASE

Petitioner filed this lawsuit on August 31, 1991 following the non-renewal of his employment contract with The Medical College of Pennsylvania ("MCP" or "the Hospital"). Disappointed with not being able to finish his career as a cardiothoracic surgeon and teacher at MCP, and having no promise of tenure on which to sue, petitioner charged that MCP discontinued his employment because he is a Colombian native.[1]

At trial, petitioner did not (and could not) argue that MCP's stated reason for not renewing Dr. Gomez's employment contract -- *i.e.*, economic difficulties with the Department of Surgery -- was false, because there was simply no evidence that MCP's decisionmakers acted with any discriminatory animus. Instead, petitioner ignored the "national original blind" nature of the actual decision and asserted that the decision not to renew his contract was due to the underlying discriminatory

[1] Petitioner brought suit in federal court against MCP, as well as other individual and institutional defendants all of whom were dismissed prior to trial, invoking the district court's federal question jurisdiction under 28 U.S.C. § 1331.

animus in the cardiologists' failure to refer cases. This, in turn, petitioner argued, prevented him from generating sufficient revenue to support himself, which caused his contract not to be renewed. On appeal, petitioner further refined his argument by asserting that it was Dr. Steven Meister, Chief of Cardiology, alone, who discriminatorily refused to refer cases to him, which caused his contract not to be renewed. As determined by the district court and the Third Circuit, the evidence necessary to sustain these arguments does not exist in the record.

As the petition is replete with misstatements of fact, the respondents respectfully direct the Court's attention to the Third Circuit's opinion for an accurate statement of the facts.

In his statement of the case, petitioner, without any support in the record, states that Dr. Meister was the "main referrer" of cardiac patients for surgery, Pet. at 3.[2] There was no testimony to this effect nor evidence that the majority of referrals were controlled by Dr. Meister. Petitioner also offered no evidence that, if he had obtained referrals from all of the rest of the cardiologists, he would not have been able to support himself financially without referrals from Dr. Meister.

In addition to mischaracterizing Dr. Zaren's testimony, petitioner incorrectly states that Dr. Meister never

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[2] Petitioner's statement of the case also makes reference to the content of the recommendation letter of Dr. Gerald Lemole. Pet. at 3. This, like the other letters of recommendation offered by petitioner at trial, were not admitted for their content, but solely for the purpose of showing that Dr. Gomez had been recommended for the position. App. at 441a-443a.

referred patients to petitioner. Pet. at 4. The uncontradicted evidence, however, is to the contrary.

The practice among the cardiologists, including Dr. Meister, was to refer a case to a team or group, making individual referrals only where the referring doctor or patient requested it or there was some special procedure involved with which a particular surgeon was especially adept. App. at 345a, 355a-356a, 416a-417a.[3] In the case of petitioner, the full-time cardiologists never made referrals specifically to him, because, according to the cardiologists, no patient or referring doctor ever requested him. App. at 345a, 416a, 552a, 560a-561a. Some of the cardiologists did not even know that petitioner performed as a primary surgeon. App. at 548a, 551a, 573a-575a. All of the cardiologists, however, made referrals to MCP's full-time cardiothoracic surgery group (the Spagna/Gomez team), which Dr. Spagna, as Chief, may have ultimately assigned to petitioner to be the primary surgeon. Indeed, in the interest of building a strong heart program, it was considered preferable to refer cases to the full-time, in-house team. App. at 354a-355a.

Eventually, however, as noted in the Third Circuit's opinion, each of these cardiologists independently made the decision to stop referring cases to the Spagna/Gomez team.[4] App. at 423a-426a, 545a-547a, 561a-562a, 576a-577a, 584a-588a. The cardiologists complained that

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[3] All references to the record are to the appellate appendix.

[4] In the early 1980's, similar problems had occurred with full-time cardiothoracic surgical team that also led the cardiologists to stop referring cases to the full-time team. App. at 384a-385a.

they were losing patients who should have lived and were seeing more complications and readmissions than normal.[5] *E.g.*, App. at 561a-563a. The suspicion that something was wrong led Dr. Meister to collect data on the surgical results of the Spagna/Gomez team. App. at 394a. The data confirmed a higher mortality and morbidity rate with the Spagna/Gomez team. *Id.*

Not only were the surgical outcomes bad, but the cardiologists testified that their patients were no longer being managed in the manner their patients deserved, let alone that the cardiologists had come to expect. *E.g.*, App. at 563a, 586a-588a. Although the interactions between the cardiologists and the full-time surgeons had traditionally been very good, this was not the case with the Spagna/Gomez team. In particular, there were the numerous incidents involving Dr. Gomez described in the Third Circuit's opinion. Pet. App. 6-7. The cardiologists thought that these conflicts were directly contributing to their patients' poor outcomes. *E.g.*, App. at 586a-588a. As a result of the poor surgical results and the problems with post-operative treatment, there simply came a point when each of the cardiologists, exercising his independent professional medical judgment as a physician acting in the best interests of his patients, could no longer in good conscience continue to refer patients to the Spagna/Gomez team. App. at 384a, 423a-426a, 545a-548a, 561a-562a, 564a, 574a-578a, 584a-588a.

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[5] This is what is referred to as mortality and morbidity.

REASONS FOR DENYING THE WRIT

Petitioner, in a final, desperate attempt to hold on to an unfounded multi-million dollar jury verdict, misstates the facts and the law and misinterprets the Third Circuit's opinion in a failed effort to create an issue to justify this Court's granting certiorari. Although petitioner complains of conflicts in the law of the circuits and the denial of his constitutional rights, his real complaint is that the Third Circuit made erroneous factual findings and misapplied the law. In either case, the arguments are unsupported and do not otherwise justify this Court's review of the Third Circuit's decision.

I. THE THIRD CIRCUIT PROPERLY CONCLUDED THAT THE RECORD LACKED THE MINIMUM QUANTUM OF EVIDENCE FROM WHICH A JURY MIGHT REASONABLY CONCLUDE THAT DISCRIMINATION WAS A DETERMINATIVE FACTOR IN THE EMPLOYMENT DECISION.

The Third Circuit, after reading the briefs of and hearing oral argument from the parties, and carefully reviewing the record, reached the conclusion that the judgment as a matter of law must be sustained because the record was critically deficient of the minimum quantity of evidence needed to defeat a motion for judgment as a matter of law. Pet. App. at 17. According to the court, the record only established "good faith differences between plaintiff and other members of the staff over the proper treatment of patients at the hospital as well as personality conflicts unrelated to invidious discrimination." *Id.*

A. The Third Circuit Applied the Appropriate Standard of Review of an Entry of Judgment as a Matter of Law.

In reviewing the district court's grant of judgment as a matter of law, the Third Circuit applied the same standard as the district court. *Compare* Pet. App. at 11 *with* Pet. App. at 27. And, the district court clearly considered the testimony of the cardiologists. Pet. App. at 31-44. Petitioner did not, however, assert in his appeal to the Third Circuit that the district court improperly considered the entire record. Accordingly, this issue has been waived and this Court is without jurisdiction to hear it.

In determining if the non-moving party has put forth sufficient evidence from which a reasonable jury could afford relief, the Third Circuit, like the majority of the circuits, considers all the evidence. *E.g., Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692 (3d Cir. 1993) (quoting *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 190 (3d Cir. 1992));[6] *Bell v. May Dept. Stores, Co.*, 866 F.2d 452, 455 (D.C. Cir. 1989); *Simon v. Shearson Lehman Bros., Inc.*, 895 F.2d 1304, 1310 (11th Cir. 1990); *Klein v. Grynberg*, 44 F.3d 1497, 1503 (10th Cir.), *cert. denied*, ___

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[6] *Inventive Music Ltd. v. Cohen*, 617 F.2d 29 (3d Cir. 1980), is not inapposite. The court in *Inventive Music* was reviewing the trial court's grant of a directed verdict at the close of the plaintiff's case. Thus, the only evidence offered was the plaintiff's. *Id.* at 33. Furthermore, the recent decisions of the Third Circuit have consistently reviewed all of the evidence. *E.g., Parkway Garage*, 5 F.3d 685; *Cassidy Podell Lynch, Inc. v. Snydergeneral Corp.*, 944 F.2d 1131, 1137 (3d Cir. 1991) (quoting *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1273 (3d Cir. 1979) (in banc)).

U.S. ___, 116 S. Ct. 58 (1995); *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. ___ (1993) (evidence considered as a whole); *Lester v. Resolution Trust Corp.*, 994 F.2d 1247, 1253 (7th Cir. 1993); *Douglas v. Eaton Corp.*, 956 F.2d 1339, 1345 (6th Cir. 1992) (court must consider all the admissible evidence); *Barnett v. I.R.S.*, 988 F.2d 1449, 1453 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 546 (1993); *Martin v. Cavelier Hotel Corp.*, 48 F.3d 1343, 1350 (4th Cir. 1995); *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, 952 (2d Cir.), *cert. denied*, 459 U.S. 1007 (1982) (quoting *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976)).

Although petitioner asserts that there is a conflict among the circuits, Pet. at 18, of the cases he relies on, only one, *Dace v. ACF Indus., Inc.*, 722 F.2d 374, 376 (8th Cir. 1983), clearly states that the court should disregard the evidence produced by the moving party and should consider only the evidence favoring the nonmoving party. But, the standard stated by the Eighth Circuit in *Dace* is not absolute. As noted by the Eighth Circuit in *McAnally v. Gildersleeve*, 16 F.3d 1493, 1496 (8th Cir. 1994), the *Dace* court "left open instances in which a reviewing court can consider the moving party's evidence," including where that evidence is uncontradicted and unimpeached.

Furthermore, while the fact that the Eighth Circuit's standard is not in accord with the Third Circuit or the majority of the other circuits may justify reviewing an Eighth Circuit decision, it does not justify reviewing the decision of the Third Circuit. And, this Court has already

declined to hear this issue. *Schwimmer v. Sony Corp.*, 459 U.S. 1007 (1982).[7]

Moreover, in the context of a discrimination case based on pretext, such as this one, it is illogical that the court would look only to the plaintiff's evidence. A court has to look at the defendant's evidence to determine if the plaintiff has put forth sufficient evidence from which a reasonable jury could conclude that "but for [discrimination] he would not have been discharged." *Billet v. CIGNA Corp.*, 940 F.2d 812, 815 (3d Cir. 1991). In other words, the question is whether the plaintiff offered sufficient evidence to rebut the employer's legitimate, nondiscriminatory reason for the challenged employment decision and from which a jury could reasonably conclude that discrimination was the real reason for his termination. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The court must therefore consider the defendant's evidence, as the Eighth Circuit did in *Dace*, 722 F.2d at 378-79.

In the present case, this required the court to consider the testimony of the cardiologists who petitioner asserted failed to refer cases to him because he is Colombian. It was for petitioner to put forth sufficient evidence from which a reasonable jury could conclude that the reasons offered by the cardiologists for not referring cases

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[7] Although Justice White states in his dissent that there is a conflict among the circuits, *Schwimmer*, 459 U.S. at 1009, it appears that, since 1982, the circuits have moved toward a more unified position. This self-correcting movement further advocates against granting certiorari and towards allowing the circuits to resolve any remaining conflict on their own.

to the Spagna/Gomez team -- the exercise of their professional judgment -- was a pretext for discrimination, which petitioner failed to do.

B. The Third Circuit's Alleged Misapplication of the Standard for Judgment as a Matter of Law Does Not Warrant This Court's Review.

Petitioner's real complaint is not with the standard set forth by the Third Circuit, but its application of the standard to these facts. Petitioner therefore argues that, had the court correctly applied the standard, it would have made the findings necessary to support the jury's verdict. Pet. at 19-20.

As an initial matter, while the "findings" suggested by petitioner might support a prima facie case, they do *not* support the conclusion that MCP discriminated against petitioner because he is Colombian. As noted by the Third Circuit, once the case has been tried to a jury, the question of the prima facie case drops out and the sole question becomes "whether the plaintiff has established by a preponderance of all of the evidence that discrimination was a determinative factor in the employment decision." Pet. App. at 12. Thus, evidence of petitioner's national origin, qualifications,[8] and replacement by someone not within the protected class[9] are not relevant to whether petitioner established that but for discrimination he would have retained his position.

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[8] As noted above, *see infra* at 3 n.2, the content of the "glowing support letter," *see* Pet. at 23, could not be considered by the jury.

[9] Dr. Whitman was not hired to replace petitioner, *see* Pet. at 20, but to replace Dr. Spagna as chief. It was for that reason that

In addition, petitioner's suggested findings are not supported by the record. There was no evidence that Dr. Meister was "responsible for making patient referrals to petitioner," that he "harbored an acute national origin bias against petitioner," or that he had a practice of testing all new surgeons. There was nothing in the record that suggested any of the cardiologists *had* to refer cases to the full-time surgeons or that Dr. Meister's and the other cardiologists' problems with petitioner were based on anything other than poor surgical results and petitioner's post-operative treatment of the cardiologists' patients. And, the record only showed that, in the case of the proposed new Chief of Cardiothoracic Surgery, Dr. Whitman, that Dr. Meister "tested" his skills as a surgeon by referring numerous cases to him where the results continued to be positive. App. at 351a-352a.

Similarly, petitioner argues that the Third Circuit improperly determined the credibility of the cardiologists. The principal problem with petitioner's argument is that the evidence he offered was not conflicting with the cardiologists' testimony. Petitioner did not establish that the cardiologists were lying when the cardiologists testified about their nightmarish experiences with petitioner. In fact, if anything, petitioner's evidence corroborated the cardiologists' testimony by confirming that these events took place. Nor did petitioner offer evidence to suggest that the cardiologists did not believe they were acting in

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Dr. Whitman was "tested" by Dr. Meister. App. at 351a-352a. There was no evidence that Dr. Meister, as a matter of practice, "tested" all new surgeons. *See* Pet. at 20.

the best interests of their patients when they ceased making referrals to the Spagna/Gomez team. In other words, there was no basis for the jury not to believe the cardiologists.

Moreover, in asserting that the Third Circuit improperly credited the doctors' testimony, petitioner overstates the dictum upon which he relies.[10] The Third Circuit did not suggest that the evidence of medical institutions was to be accorded greater weight, Pet. App. at 16; it simply suggests that due deference should be given to the proper exercise of medical judgment, *see id.* In fact, the Third Circuit did not decide whether the cardiologists' conduct could even be imputed to the Hospital. Pet. App. at 13. In sum, there can be no fear that future courts will rely on this opinion for the proposition that the evidence of medical institutions in Title VII cases is to be afforded greater weight.

II. THE THIRD CIRCUIT APPLIED THE CORRECT STANDARD OF PROOF FOR NATIONAL ORIGIN DISCRIMINATION UNDER TITLE VII.

Contrary to petitioner's assertion, the Third Circuit did not require any greater proof of unlawful national

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[10] Petitioner's suggestion that the Third Circuit was somehow bound to accept the Equal Employment Opportunity Commission's ("EEOC") evaluation of the facts, Pet. at 16 n.10, is unfounded. This did not involve statutory interpretation, let alone the court's review of an EEOC decision invoking such an interpretation. The "fundamental principle" referred to by Petitioner, *id.*, is therefore inapplicable. *See, e.g., Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

origin discrimination than that required by other courts. Courts have held that discrimination can be inferred by showing that an employer has based an employment decision on characteristics clearly related to the plaintiff's national origin.[11] Thus, circuit courts have held that an employer cannot lawfully base a decision on an employee's accent, unless it materially interferes with job performance, because "an accent and national origin are inextricably intertwined." *Odima v. Westin Tuscon Hotel Co.*, 991 F.2d 595 (9th Cir. 1993) (quoting *Fragante v. City and Cty. of Honolulu*, 888 F.2d 591, 596 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990)). *Accord Carino v. University of*

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[11] *Johnson v. Fleet Mortgage Corp.*, 878 F. Supp. 71 (E.D. La. 1995); *Metoyer v. State of Kansas*, 874 F. Supp. 1198 (D. Kan. 1995); and *Yacoub v. McGovern*, 840 F. Supp. 947 (N.D.N.Y. 1993), also do not support petitioner's argument of a conflict. In *Johnson*, 878 F. Supp. at 75, and *Yacoub*, 840 F. Supp. at 954, the district courts held that plaintiffs had established a prima facie case of national origin discrimination by offering direct evidence that the challenged employment decisions were based on their national origin. For example, in *Johnson*, 878 F. Supp. at 75, the plaintiff offered statements made by the decisionmaker that the plaintiff was being terminated because of her looks and because there were "too many employees of the same skin complexion." In *Metoyer*, 874 F. Supp. at 1203, the court held that the plaintiff could establish that she belonged to a protected national origin, an essential element to her prima facie case, without exacting proof of membership.

It was not disputed, nor relevant on appeal, that petitioner had made out a prima facie case by showing he was Colombian and thus a member of a protected class. Also, it should be noted that the court in *Metoyer* stated that the defendant's knowledge of "the plaintiff's [specific] national origin is critical to establishing that she was terminated under circumstances giving rise to an inference of discrimination." *Id.*

Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984); *Berke v. Ohio Dept. of Pub. Welfare*, 628 F.2d 980 (6th Cir. 1980). Thus, where plaintiffs establish that the employment decisions were based on their accents, unlawful discrimination may be inferred. *E.g., Carino*, 750 F.2d at 819; *Berke*, 628 F.2d at 981. The cases do not hold that a plaintiff need only show "general foreign characteristics."

There was, however, no evidence here that the non-renewal decision or the failure to refer cases to petitioner or the Spagna/Gomez team was based on petitioner's accent or some other characteristic "inextricably intertwined" with his being Colombian. Accordingly, the Third Circuit's decision is not in conflict with decisions of other circuits.

The burden of proof of discrimination is not diminished by the holding in *O'Connor v. Consolidated Coin Caterers Corp.*, 64 U.S.L.W. 4243, 1996 U.S. LEXIS 2168 (April 1, 1996).[12] *O'Connor* merely held that a plaintiff can make out a prima facie case of age discrimination by establishing that he lost his job to a younger employee, even if that employee is within the protected class, *i.e.*, over 40. This does not mean that, once the defendant put forward evidence of a non-discriminatory reason for replacing the older employee, the plaintiff does not need

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[12] Petitioner's reliance on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in support of his argument that the Third Circuit improperly discounted discriminatory bias based on the favorable treatment of other members of the protected group is incomprehensible. Petitioner selectively quotes from a portion of this Court's opinion discussing sex stereotyping, something clearly not in issue here.

to establish that those reasons were false and that discrimination was the real reason.

By analogy, if this holding were to apply to national origin discrimination, which it is not clear it would, it suggests only that a plaintiff could make out a prima facie case of national origin discrimination if he establishes that he lost his position to someone who is not of his national origin, even if that person is not himself an American. As noted above, however, the issue here is not whether petitioner made out his prima facie case, but whether he satisfied his ultimate burden of demonstrating by a preponderance of the evidence both that MCP's legitimate, non-discriminating reasons for its actions were false *and* that discrimination was the real reason. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502.

Moreover, if petitioner is correct and a prima facie case of national origin discrimination could be established by a mere showing that one is foreign, then there would be no basis to infer discrimination if other foreigners were treated better.

III. THE CONCLUSIONS REACHED BY THE THIRD CIRCUIT THAT WERE NOT ESSENTIAL TO THEIR DECISION DO NOT WARRANT SUPREME COURT REVIEW.

Petitioner asserts that this Court should review the Third Circuit's decision based on the dicta contained in the decision. The court, after concluding that the letter of Dr. Meister did not support an inference of discrimination, noted that the letter and other comments of Dr. Meister more properly fall into the category of stray

remarks by non-decisionmakers.[13] Pet. App. at 16. In reaching this conclusion, the court also stated that the exception to the stray remarks doctrine for statements made by non-decisionmakers did not apply. *Id.* As these statements were not essential to the Third Circuit's holding, their resolution to the contrary would not affect the result in this case.

In any event, the Third Circuit's statement in dictum that Dr. Meister's comments do not support an inference of discrimination by MCP because he was not petitioner's supervisor is not in conflict with other decisions of the Third Circuit[14] or decisions of other circuits. Courts have held that the discriminatory comments or conduct of non-decisionmakers will support an inference of discrimination only if those comments or conduct were the basis of or cause for the otherwise innocent, adverse employment

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[13] Petitioner's assertion that Dr. Meister's letter was made "concerning an important aspect of employment decisionmaking: patient referrals," Pet. at 11, is preposterous. There is no reference in the letter to patient referrals. The letter expressed Dr. Meister's opinion about Dr. Gomez's qualifications for the position. There is also no evidence that Dr. Meister made a decision, at that time, not to refer patients to petitioner. Rather, the letter makes clear Dr. Meister's intent to support Dr. Spagna's choice of partner.

[14] Petitioner's reliance on *Abram's v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995) and *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 639 (3d Cir. 1993), as conflicting Third Circuit authority is misplaced. Petitioner quotes from dictum in *Abrams*. In *Abrams*, the court held that the evidence supported a jury finding that the supervisor participated in the decisionmaking, which Dr. Meister didn't do. Similarly, *Josey* speaks to cases where the supervisor influenced the decisionmaking process, which, again, is not the case here.

decisions of the decisionmakers. *See, e.g., Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994).

Critical to this analysis, however, is that the non-decisionmaker is plaintiff's supervisor and that supervisor's discriminatory animus or disparate treatment influenced the decision. *E.g., Roebuck v. Drexel Univ.*, 852 F.2d 715 (3d Cir. 1988) (supervisor's negative evaluation read by decisionmakers and considered in making termination decision); *Wilson v. Susquehanna Township Police Dep't*, 55 F.3d 126 (3d Cir. 1995) (decisionmaker used supervisor's discriminatory comments as explanation for his decision); *Shager*, 913 F.2d 398; *Vaughn v. Edel*, 918 F.2d 517 (5th Cir. 1990) (disparate treatment of plaintiff by supervisor led to termination decision); *Simpson v. Diversitech Gen., Inc.*, 945 F.2d 156 (6th Cir. 1991) (disparate treatment and negative evaluations by supervisor led to plaintiff's termination). Only if these critical requirements are met is it irrelevant that the non-decisionmaker did not "pull the trigger." *See Stacks*, 27 F.3d at 1323.

Petitioner has not disputed (nor could he) that Dr. Meister was not his supervisor. Accordingly, the Third Circuit's conclusion that the exception was inapplicable was in accordance with the prior holdings of the Third Circuit and other circuits.

IV. THE FACT THAT ONLY TWO MEMBERS OF THE PANEL PARTICIPATED IN DRAFTING THE OPINION AND CONSIDERATION OF THE PETITION FOR PANEL REHEARING DID NOT RESULT IN THE DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS.

Petitioner, by failing to raise the issue in his petition for rehearing, waived his argument that his constitutional rights were violated because one of the panel judges died before the opinion was drafted and thus neither participated in the drafting of the opinion nor in the consideration of panel rehearing. In any event, petitioner's argument fails because the use of two judges is sanctioned by federal law and local rules.

There is no statutory right to have three circuit judges draft an opinion. There is not even a statutory right to have three circuit judges hear oral argument. *United States v. Mills*, 317 F.2d 764 (4th Cir. 1963). 28 U.S.C. § 46(b) only requires that three judges be assigned to a panel in the first instance. *Murray v. National Broadcasting Co.*, 35 F.3d 45, 47 (2d Cir. 1994). That one of those judges later does not ultimately participate in the full appellate process does not affect an appellant's rights. *Id. Accord Mills*, 317 F.2d 764.

Rather, all that is needed to render a decision is a quorum. *United States v. Allied Stevedoring Corp.*, 241 F.2d 925, 927 (2d Cir.), *cert. denied*, 353 U.S. 984 (1957). A quorum exists if there are a majority of the number of judges authorized to constitute a court or panel thereof. 28 U.S.C. § 46(d). A panel shall include *no more than* three judges. 28 U.S.C. § 46(c). In this case, the decision was reached by the full panel, Pet. App. at 1 n.*, and the

opinion was drafted by a quorum. Accordingly, the case was properly disposed. *See Allied Stevedoring*, 241 F.2d at 927.

In addition, the Third Circuit has made provision for the use of panels consisting of fewer than three judges. The Internal Operating Procedures of the Third Circuit provide that "[u]nless there is a judicial emergency, each panel includes at least two judges of this court." Internal Operating Procedures of the United States Court of Appeals for the Third Circuit at § 3.1. In this case, the panel consisted of the number of judges of the court required by local procedure and more than the number required in the case of an emergency.

Moreover, petitioner's argument misses a critical point -- there was total concurrence in the panel's decision to affirm the district court's decision. That Judge Hutchinson's participation may have resulted in the court's opinion expressing some other grounds for affirming the lower court's decision is inconsequential. And, because Judge Hutchinson agreed with the decision of the Court, there is no more reason to believe that he would have considered rehearing than would Judge Weis or Roth.

Furthermore, petitioner also sought rehearing in banc. Thus, all active Third Circuit judges had an opportunity to reconsider the decision, but declined. *See* Internal Operating Procedures of the United States Court of Appeals for the Third Circuit at § 9.5.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari directed to the United States Court of Appeals for the Third Circuit should be denied. Petitioner has failed to present any special or important reasons for this Court's review.

Respectfully submitted,

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